No. 79-131

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEA-LAND SERVICE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1979. A petition for rehearing was denied on May 1, 1979 (Pet. App. 8a). The petition for a writ of certiorari was filed on July 27, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner waived the attorney-client privilege with respect to documents which its counsel knowingly

and purposely delivered to the government on behalf of petitioner without invoking the privilege and which were subsequently used in a grand jury investigation.

STATEMENT

1. In August 1976, a grand jury investigating ocean transportation of freight issued a subpoena duces tecum directing petitioner to produce certain categories of documents relevant to the investigation. The subpoena stated that if petitioner declined to produce any documents on the ground that they were privileged, petitioner should present a list of such documents (J.A. 28-38, 113).[1]

On September 30, 1976, petitioner's original counsel delivered six boxes of documents to the government attorney in charge of the investigation. The documents were accompanied by a transmittal letter signed by a senior partner of the law firm; petitioner did not submit a list of documents withheld on the basis of privilege. After government counsel advised petitioner's counsel that some of the documents produced were marked "P" and that some of the documents appeared to be photocopies rather than originals, petitioner's attorney, accompanied by the prosecuting attorney, individually examined each document marked "P." Following this examination, petitioner's attorney assured the government attorney that he had conferred with the senior partner and that the government was intended to have these documents. In fact, petitioner's counsel exchanged the originals of some of these documents for the photocopies originally delivered to the government. Subsequently, the senior partner who signed the transmittal letter also assured the government that petitioner had intended to deliver those

[1]"J.A." refers to the Joint Appendix filed in the court of appeals.

particular documents to the United States, and that the marked documents had been initially screened as privileged but were not actually exempt from disclosure. On the basis of these representations, the grand jury was permitted to consider all relevant documents that had been produced, including some marked "P" (Pet. App. 4a-5a; J.A. 42, 114-120).

On March 9, 1977, petitioner's counsel telephoned government counsel and advised that several documents had been disclosed inadvertently. After a meeting, petitioner's counsel stated that they would make a formal written request for return of the documents. However, petitioner's original counsel never made a written request for the return of the documents (J.A. 121-122, 132-133).

The next communication concerning the documents occurred in late December 1977, when new counsel for petitioner, retained to represent it in the grand jury investigation, spoke with the government attorneys. A government attorney informed these counsel that documents marked "P" had been produced.[2] During January and February 1978, almost a year and a half after the documents had been produced, the new counsel made a formal request for return of the documents marked "P." In June 1978, the new counsel also formally requested the return of 10 additional documents that had not been marked "P" and concerning which no claim of privilege had previously been made. The government denied both requests and continued to use all of the documents that had been turned over to the grand jury, including those marked "P" (J.A. 51, 55, 72-76, 122-123).

[2]Petitioner's original counsel had informed petitioner of the production of the documents on December 2, 1977, but petitioner did not advise its new counsel of the problem (J.A. 133-134).

2. On June 7, 1978, Richard Halloran, petitioner's employee, refused to testify before the grand jury when questioned about matters contained in the disputed documents. The United States filed a motion to compel his testimony. Petitioner opposed this motion and also filed the motion at issue here, requesting return of 11 of the documents marked "P" and the ten additional documents (J.A. 2-3). After a hearing, the district court ordered Halloran to testify, holding that petitioner had waived any attorney-client privilege as to the documents in question (J.A. 21-22).

On appeal, the court of appeals affirmed (Pet. App. 1a-7a). It concluded that the original counsel's decisions regarding the various documents were binding on petitioner. The court observed that counsel had acted within the scope of their authority and that the confidentiality that may have once protected the documents "has been so irretrievably breached [by their use in the grand jury] that an effective waiver of the privilege has been accomplished" (Pet. App. 4a-6a). The court distinguished cases relied on by petitioner, noting that petitioner had adequate opportunity to claim the privilege, that the documents had been used by the government in good faith for several years, and that, in sum, this was not "a case of mere inadvertence where the breach of confidentiality can be easily remedied" (Pet. App. 6a-7a).

After the court below rendered its decision, the grand jury returned a one-count indictment charging petitioner and others with violating Section 1 of the Sherman Act, 15 U.S.C. 1. Petitioner entered a plea of nolo contendere to the indictment and has been sentenced. At the completion of the litigation, the government returned the originals of the documents at issue but retained copies (Pet. 5-6).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court is unwarranted.[3]

Petitioner contends (Pet. 6-9) that it did not waive its attorney-client privilege regarding various documents. Petitioner, however, voluntarily authorized its counsel to produce on behalf of the corporation those documents which were not protected by the attorney-client privilege. Petitioner thus implicitly directed its counsel to act as its agent in responding to the government's request for documents. See VIII *Wigmore on Evidence*, § 2325 (McNaughton rev. 1961). Thereafter, original counsel, acting within the scope of this agency and in good faith, delivered six cartons of papers to the government. And, contrary to petitioner's suggestion, the documents were not turned over inadvertently. See Pet. App. 6a. Rather, counsel had repeated opportunities to inspect the documents and, in fact, specifically reconsidered the several documents marked "P" at the government's request. Accordingly, petitioner cannot now be heard to complain simply because years later different counsel would have evaluated the privileged nature of certain documents differently.[4] See *McCormick's Law of Evidence* § 93, at 194 (2d ed. 1972).

[3]At the outset, we note that in light of the production of documents and the plea of nolo contendere, there are substantial questions concerning the justiciability and appealability of the district court's order rejecting petitioner's claim of privilege. See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323, 328 (1940).

[4]Because both lower courts found that any attorney-client privilege had been waived, neither had occasion to decide whether the documents in question were privileged in the first instance.

Moreover, both courts below concluded that the government's good faith use and control of the documents for several years effectively waived the privilege (Pet. App. 5a-7a; J.A. 18). The attorney-client privilege pertains only to documents that have been kept confidential. See, *e.g.*, *United States* v. *Gordon-Nikkar*, 518 F. 2d 972, 975 (5th Cir. 1975); Proposed Federal Rule of Evidence 503(a)(4), (b), 56 F.R.D. 235 (1972); 2 *Weinstein's Evidence* para. 503(a)(4)[01] (1979). To be sure, an attorney's inadvertent disclosure of an otherwise confidential document for a short period of time might not waive the privilege. But where, as here, the document has been purposefully disclosed to persons outside the attorney-client relationship for a substantial period of time, the purpose of the privilege has been destroyed and the privilege will be deemed to have been waived. See, *e.g.*, *Underwater Storage, Inc.* v. *United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970); *United States* v. *Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464-465 (E.D. Mich. 1954).

Nor is there any merit to petitioner's contention (Pet. 6-7) that the decision below conflicts with decisions of other courts of appeals. In both *Transamerica Computer Co.* v. *International Business Machines Corp.*, 573 F. 2d 646 (9th Cir. 1978), and *International Business Machine Corp.* v. *United States*, 471 F. 2d 507 (2d Cir. 1972), vacated and dismissed, 480 F. 2d 293 (en banc) (1973), cert. denied, 416 U.S. 979 (1974), the courts of appeals concluded that a particular accelerated discovery program had compelled production of the documents and had thereby precluded an adequate opportunity for raising the claim of privilege. Here, in contrast, "the Government cannot be said in any way to have 'compelled' [petitioner] or original counsel to produce privileged documents; and there certainly was here an adequate opportunity in September 1976 to claim the privilege" (Pet. App. 6a).

Moreover, the panel opinion in *International Business Machines Corp.* v. *United States*, *supra*, relied on by petitioner was, in any event, vacated by the en banc court. See 480 F. 2d 293.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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